Supreme Court, U.S.
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No. 01-298

In The

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

MICHAEL J. BOWERS
Of Counsel
MEADOWS, ICHTER & TRIGG
Eight Piedmont Center,
Suite 300
3525 Piedmont Road
Atlanta, Georgia 30305
(404) 261-6020

PATRICK W. MCKEE
Of Counsel
Suite 921, The Candler
Building
127 Peachtree Street
Atlanta, Georgia 30303
(404) 577-8300

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PETITIONER'S REPLY BRIEF ON THE MERITS

REPLY ARGUMENT

STATES WAIVE THEIR ELEVENTH AMENDMENT FORUM IMMUNITY WHEN THEY REMOVE CASES TO FEDERAL COURT

A. Forfeitures of Eleventh Amendment Immunity By a State's Litigation Conduct Are Neither Constructive Waivers Nor Offensive To States' Dignity Interests

This case presents a narrow issue for the Court's decision: whether certain kinds of litigation conduct engaged in by states, particularly the affirmative invocation of federal court jurisdiction via removal, constitute a waiver of the forum immunity that states would otherwise enjoy in federal court, under the Eleventh Amendment.

1. Georgia and its amici nonetheless attempt to raise the spectre of constructive waivers of immunity, which for some years cast a pall over this Court's Eleventh Amendment jurisprudence, and which finally were interred by this Court's decision in *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Again, Petitioner would maintain that there is nothing constructive about a waiver of Eleventh Amendment immunity through a state's litigation conduct in affirmatively selecting federal court jurisdiction. This Court's *College Savings Bank* decision speaks emphatically to the point that when a state "voluntarily invok[es] the jurisdiction of the federal courts," that constitutes

an effective waiver of the state's Eleventh Amendment forum immunity, and is by no means to be viewed as a defective and suspect "constructive" act. See id. at 675-76, 681 n.3.

College Savings Bank likewise provides the relevant guidance as to the appropriate criterion to judge the effect of a state's waiver. While the *Edelman* and *Atascadero* standards for waiver assuredly have continued vitality and application in other contexts, for situations implicating litigation conduct, a state may waive its Eleventh Amendment immunity by either "voluntarily invok[ing]" federal court jurisdiction or making "a 'clear declaration' that it intends to submit itself to [the jurisdiction of the federal courts]." Id. at 675-76 (citing *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), and quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)).

2. Georgia and its amici also take to task the characterization made here that the state is waiving its forum immunity from federal court jurisdiction by affirmatively invoking that jurisdiction, and that the state retains all other immunities granted to it by law. Despite this modest proposition, Respondent's amici argue that "it would offend the state's dignity to parse sovereign immunity into defeasible components and casually discard the portion of sovereign immunity exemplified by the Eleventh Amendment." (Tex. Br. 24). In so arguing, Georgia's amici mischaracterize our argument as "diminishing the significance of the Eleventh Amendment by dubbing it a mere source of 'forum immunity.'" (Tex. Br. 24).

In differentiating between "forum" and "substantive" immunity, however, Petitioner does no more than embrace both the history of the sovereign immunity the Eleventh Amendment is said to embody and the jurisprudence of this Court. By not

limiting the Eleventh Amendment strictly to its text, see, e.g., *Alden v. Maine*, 527 U.S. 706, 727 (1999), this Court has construed the Eleventh Amendment as a constitutional recognition of broad sovereign immunity states have always enjoyed. Id. at 713. The modern jurisprudence of this Court has recognized the existence of both a forum and a substantive component to both sovereign immunity and the Eleventh Amendment. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) ("a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued" (citing *Pennhurst II*, 465 U.S. at 99)) (emphasis original); see also *Nevada v. Hall*, 440 U.S. 410, 414-15 (1979) (discussing two components of sovereign immunity). A "waiver by removal" rule simply recognizes that by affirmatively selecting the federal forum through removal, the state has chosen to forfeit the "where" component of sovereign immunity. Whether the state still enjoys the substantive protections of immunity is left to the adjudicative authority of the federal district court.

In addition, Respondents' amici urge that allowing a state to waive its forum immunity through removal, while keeping intact whatever other immunities or defenses it might have, offends "'the dignity and respect afforded a state.'" (Tex. Br. 26) (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997)). In arguing that the state's sovereign immunity is not defeasible, amici rely on the dignitary interest this Court has recognized in cases such as *Coeur d'Alene*. However, such a dignitary interest is not offended by a rule requiring waiver of forum immunity upon removal.

In ascertaining what is protected by the State's dignitary interest, *Hans v. Louisiana*, 134 U.S. 1 (1890), is informative, given that the *Hans* Court did not have the benefit of controlling text. In finding that suits by a state's own citizens were barred

by the Eleventh Amendment, the Court quoted extensively from the Framers to determine what their beliefs were as to state immunity. John Marshall, in discussing federal court jurisdiction at the Virginia Ratification Convention, noted that "I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court." Id. at 14 (citing 3 DEBATES ON THE FEDERAL CONSTITUTION 555 (J. Elliot 2d ed. 1854)). James Madison echoed Marshall's statements, noting that ". . . [i]t appears to me that this [clause] can have no operation but this – to give a citizen a right to be heard in the federal courts; and if a State should condescend to be a party, this court may take cognizance of it." Id. (citing 3 id. 533). See also *Alden v. Maine*, 527 U.S. 706, 717-18 (1999) (quoting the same statements from Marshall and Madison).

These statements from the Framing Generation show that they were concerned about states being forced to appear before the federal courts. While Petitioner does not argue that removal alters the stance of the parties such as to make a plaintiff out of a defendant, it must be the case that affirmatively seeking out a federal forum cannot be equated with being "dragged" before that court. The dignitary interests of a state, and the accompanying federalism concerns first recognized by the *Hans* Court, simply are not offended when a state defendant affirmatively seeks a federal forum through removal. Accordingly, the proffered reasons for why the various immunities held by a state must not be "defeasible" fail.

B. This Court's Decisions Indicate That a State's Invocation of Federal Court Jurisdiction is a Waiver of Eleventh Amendment Immunity

Where a state becomes a party to litigation (and irrespective of whether it is cast in the role of plaintiff, defendant, claimant, or intervenor), that suffices to reach the logical conclusion that the state has itself raised the Eleventh Amendment bar by submitting a matter to determination by a federal court. Both the *Clark* and *Gardner* opinions speak to the role of the state as "actor" in these circumstances. See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883) (the state became "an actor as well as defendant" in the proceeding); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) ("[w]hen the State becomes the actor and files a claim . . . it waives any immunity which it otherwise might have. . . ."). To attempt to distinguish these cases on the basis that they do not treat the situation of a state-defendant affirmatively invoking federal court jurisdiction through removal is to miss the point entirely. It is the state's role as an actor in initiating the federal forum which provides the basis for waiver of Eleventh Amendment immunity.

Georgia's attempt (Resp. Br. 17) to limit *Gunter v. Atl. Coast Line R. Co.* to situations where a state "acquiesces" to federal court jurisdiction over a particular dispute for an extended period of time is likewise unavailing. This Court's opinion manifestly sweeps more broadly than that crabbed reading. See 200 U.S. 273, 284 (1906) ("where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment."). This Court's emphasis in *Gunter* on the voluntary nature of the state's

litigation conduct suggests the proper disposition of this case. Where a state knowingly and voluntarily invokes federal court jurisdiction, it waives any forum immunity defenses it might otherwise have. In that sense also, Georgia "acquiesced" to federal court jurisdiction over the entirety of Lapides' case when it sought, and secured, removal.[1]

Lastly, Georgia and its amici struggle mightily to distinguish this Court's decision in *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916). While Petitioner recognizes that the holding in *Richardson* and the other Puerto Rico immunity cases is complicated by the unique status that the Commonwealth holds in American federalism,[2] we are compelled – as is Respondents' amici (see Tex. Br. 12-13 n.2) – to conclude that these cases stand as strong authority for the proposition that once a state invokes federal court jurisdiction it is not free to renounce that choice. This Court in *Richardson* denied the defendant's assertion of immunity as untimely. The Court said: "Whatever might have been the merit of [defendant's] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction." Id. at 47. Even more significantly, the

[1] That included Lapides' request for declaratory relief through judicial findings that defamatory material had been placed in his personnel files and had been inappropriately disclosed. See J.A. 17 (¶ 26).

[2] Puerto Rico is treated as a state for Eleventh Amendment purposes. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141-42 n.1 (1993) (assuming this point *arguendo*); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983); *see also People of Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913) ("Porto Rico . . . come[s] within the general rule exempting a government sovereign in its attributes from being sued without its consent.").

Richardson decision relied on an earlier ruling in *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914), in which Puerto Rico first intervened as defendant in a case, but later asserted sovereign immunity from suit. In that case, this Court rejected the attempt to raise the immunity defense: "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step." Id. at 632.

The litigation tactics condemned by the Court in *Ramos* more than approximate Georgia's conduct in this case. And while this Court need not consider here the situation in which a state "merely" acquiesces in federal court jurisdiction,[3] the principles enunciated in *Richardson* and *Ramos* – as well as *Clark* and *Gunter* – strongly indicate that where a state affirmatively invokes federal court jurisdiction, it waives its forum immunity in federal court, and may not later disclaim that decision.

C. Removal Unambiguously Evinces a State's Voluntary Consent to Federal Court Jurisdiction

The nub of this case remains whether removal is such a clear form of litigation conduct in invoking federal jurisdiction, so as to constitute a manifest forfeiture of the state's Eleventh Amendment immunity. Georgia and its amici raise a number of grounds suggesting that removal is not a sufficiently voluntary or consensual waiver of Eleventh Amendment immunity. None

[3] That issue seems to be presented in the Petition filed in *Montgomery v. Maryland*, 266 F.3d 334 (4th Cir. 2001), cert. filed, Docket 01-1079 (docketed Jan. 24, 2002).

of these contentions has merit.

1. The opposing briefs suggest that because removal is merely a defensive tactic, it carries with it no legal consequences in waiving a state's Eleventh Amendment forum immunity in federal court. Indeed, Respondents' amici refer to removal as a completely defensive action. (Tex. Br. 10-12, 14). However, as noted by the Respondents, removal is more appropriately characterized as one of the rare circumstances when "plaintiffs who sue a State and States being sued are both faced with a forum choice." (Resp. Br. 26). Professor Neal Miller stated it best when he wrote that "through removal, defense attorneys can make forum selection choices almost as frequently as plaintiff attorneys." Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 386 (1992). See also *Borneman v. United States*, 213 F.3d 819, 829 n.2 (4th Cir. 2000) ("We understand removal to be a forum selection procedure. . . .").

Respondents suggest that there might even be a constitutional right to removal that would be offended by a rule requiring waiver of the Eleventh Amendment upon removal to federal court. (Resp. Br. 21, n.4). However, this Court has unequivocally held that the right to removal is statutory in nature. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816), in commenting on Congress' power to authorize removal of cases from state to federal court, the Court held that "[t]his power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power." Id. See also *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918) (right of removal is statutory). *Terral v. Burke Const. Co.*, 257 U.S. 529 (1922), cited by Respondents, simply stands for the rather unremarkable

proposition that a state may not condition the right to conduct business within its borders upon a waiver of the right to resort to the federal courts. Id. at 532. Indeed, Georgia's own amici apparently do not share its characterization of removal as some form of constitutional right. (See Tex. Br. 8).

Georgia thus makes a somewhat dissonant contention that removal is either a mere procedural tactic (and thus does not rise to a level of voluntary and knowing forfeiture of Eleventh Amendment immunity) or a robust constitutional right (which cannot be consensually waived). The reality is, of course, somewhere between these submissions. As already noted, Petitioner is by no means suggesting that removal somehow realigns plaintiffs into defendants and vice versa. But it is manifest that removal does act as a forum selection and an affirmative invocation of federal court jurisdiction.

2. Both Georgia and its amici strenuously maintain that the ostensible reason for the state's litigation gambit of "remove-and-claim-immunity" is to take advantage both of the federal court's expertise in section 1983 cases and of interlocutory appeals on denials of qualified immunity defenses. (See Resp. Br. 10, 20; Tex. Br. 2-3, 6-8, 27-28).

As for the intimation that federal courts have superior knowledge of the construction of federal statutes, including section 1983, this Court, at the urging of the states, has "repeatedly and emphatically" rejected the proposition that "state courts are not competent to adjudicate federal constitutional claims." *Moore v. Sims*, 442 U.S. 415, 430 (1979). Given the present volume of section 1983 litigation in state courts, "there is no intrinsic reason why the fact that a [person] is a federal judge should make him more competent, conscientious, or learned with respect to [the consideration of qualified immunity claims] that his neighbor in the state courthouse." *Stone v. Powell*, 428 U.S. 465, 493-494 n.35 (1976) (quoting Paul Bator,

Finality in Criminal Law and Federal Habeas Corpus For State Prisoners, 76 HARV. L. REV. 441, 509 (1963)), id. ("state courts, like federal courts, have an obligation . . . to uphold federal law"). As for the deeply troubling suggestion of Respondents' amici that states desire to avoid state tribunals because they often misapply federal law (see Tex. Br. 29), the answer is, of course, not to bless tactical gambits such as Georgia's here, but, rather, more stringent application of the Supremacy Clause and the wise exercise of this Court's supervisory jurisdiction in appropriate instances.

That leaves the suggestion that Georgia generously wished to confer on its employees the ability to take in federal court an interlocutory appeal from a possible denial of a qualified immunity defense, a right that is supposedly barred in state courts. But no less an authority than this Court has ruled that the right of state officials to interlocutory appeals on these issues in state court is properly a matter of state law. See *Johnson v. Fankell*, 520 U.S. 911, 919-20 (1997) ("The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with *federal* interests than a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.") (original emphasis). And, indeed, if states wish to do so they may prescribe by rule or statute the availability of such interlocutory review. Georgia's and its amici's argument thus reduces to a peculiar complaint that state legislatures are not attentive enough to the litigation needs of state officials. It is not up to this Court to countenance such a grievance.

But what is most peculiar about Georgia's argument in this respect is that the vast majority of states *have* permitted the immediate review of denials of qualified immunity defenses. See *Arenson v. Jezwinski*, 556 N.W.2d 721, 727 n.13 (Wis.

1996) ("A majority of state courts have held that an order denying a claim of qualified immunity in a § 1983 case is immediately appealable, albeit for different reasons."); Charles D. Noland, Annotation, *Reviewability Before Trial of Order Denying Qualified Immunity to Defendant Sued in State Court Under 42 U.S.C.S. § 1983*, 49 A.L.R. 5th 717 (1997) (indicating that only 4 jurisdictions categorically reject the availability of interlocutory appeals). It should also be realized that while in Georgia a direct appeal on a denial of a qualified immunity defense is precluded, the Georgia Supreme Court has instructed that "except in clear cases, the trial courts issue a certificate of immediate review . . . for interlocutory orders denying dismissal or judgment on the basis of qualified immunity." *Turner v. Giles*, 450 S.E.2d 421, 424 (Ga. 1994).

In short, the contention that states need to be able to remove cases to federal court, without waiving their Eleventh Amendment immunity, to safeguard a supposed interest on the part of state officers to have immediate review of unfavorable qualified immunity rulings, is meritless. Under no circumstances would a state be penalized by a rule that makes removal conditioned upon a waiver of a state's Eleventh Amendment forum immunity in federal court.

3. Georgia and its amici also argue (see Resp. Br. 32; Tex. Br. 14-16) that the Court's jurisprudence regarding the parallels between federal and state sovereign immunity in the context of private suits mandates analogous treatment of the United States Attorney General and state Attorneys General. As a result, the states assert that because the U.S. Attorney General lacks the authority to waive the federal government's sovereign immunity through removal, a state Attorney General must also lack the authority to waive state sovereign immunity through removal.

This syllogistic reasoning has numerous faults. The first

is that insofar as state sovereign immunity from private suits is analogous to the corresponding federal sovereign immunity (and there are certainly significant differences and asymmetries in the doctrines), the analogy is only appropriate to the extent that the U.S. Attorney General and the state Attorneys General find themselves in parallel situations. In the case of removal from state court to federal court, however, the U.S. Attorney General and the state Attorneys General are in markedly different circumstances. When the U.S. Attorney General removes a case from state court to federal court, the United States is removing a case from the court of another sovereign to the sovereign's own court; whereas when a state Attorney General removes a case from state court to federal court, the state is removing the case from a court in which the state is sovereign to the court of another sovereign. In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court recognized that the nature of sovereign immunity changes depending on whether suit is brought in a sovereign's own courts or the court of another sovereign. See id. at 414 ("The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign"). More recently, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court again recognized this dichotomy observing that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum . . . the immunity of a sovereign in its own courts . . . [is] within the sole control of the sovereign itself." Id. at 749.

Moreover, unlike the situation where the federal government is haled into state court without consent, the state's dignity interest is not implicated here. Had the state remained in state court, it would have retained all of its sovereign powers, and accordingly all of its dignity. In this case, the state by its

own actions abandoned its sovereign forum in favor of a forum of a different sovereign. The dignitary interests that arise when the federal government is sued improperly in state court (and the resulting necessity of removal as a corrective action) simply are not present when the state originally is sued properly in its own forum.

The differences in removal, however, go beyond the different sovereign immunities implicated by a state, rather than the United States, removing. When a state removes from state court to federal court, it does so under the general removal provisions of 28 U.S.C. § 1441. This general removal is available for "*any* civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Thus the state removes a case via the same statutory mechanism any other ordinary defendant would remove.

A state's generic ability to remove, however, should be contrasted with the more specialized removal provisions under which the U.S. Attorney General removes a case. Unlike the state's removal under the general language of section 1441, the U.S. Attorney General removes a case under 28 U.S.C. § 1442 which specifically authorizes removal for a "civil action or criminal prosecution commenced in a State court against . . . [a]ny officer of the United States or any agency thereof . . . for any act under color of such office." 28 U.S.C. § 1442(a)(1).[4] A

[4] In interpreting this provision of Section 1442, this Court has stated that the underlying rationale for allowing the federal government (and its agents) to remove a case to federal court is to allow federal defenses to be raised, especially immunity. *Mesa v. California*, 489 U.S. 121, 133 (1989) (noting "one of the most important reasons for removal [under § 1442(a)(1)] is to have the validity of the defense of official immunity tried

(continued...)

state's removal under Section 1441 thus lacks the special need requirements of Sections 1442 and 1443, but also occurs under the exact opposite circumstances.

The states' analogy to federal sovereign immunity suffers also from a flaw in its minor premise: that the United States cannot consent to federal jurisdiction through removal of a case. Yet it seems clear that were the U.S. Attorney General to remove a case to federal court, it would properly be regarded as consent for the federal tribunal to rule on the United States' other jurisdictional objections to the case or on the merits.[5] This

[4](...continued)
in a federal court.") (citing *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969)). Under Section 1442(a)(1), the basis for removal specifically is to allow the court to rule on federal immunity. Id. at 129 (confirming that "federal officer removal must be predicated on the allegation of a colorable federal defense").

Similar concerns underlie the removal provisions contained in 28 U.S.C. § 1443(1) that allow for removal of civil rights cases where a party "is denied or cannot enforce in the courts of [a] State a right under any law providing for the equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1). Under the two-pronged test for removal under section 1443(1), a party must not only show that a federal law provides for specific civil rights, but also a bona fide need to be in federal court due to an inability to "'enforce' the specified federal rights 'in the courts of [the] State'." *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975) (quoting 28 U.S.C. § 1443(1)) (citing *Georgia v. Rachel*, 384 U.S. 780, 803 (1966)).

[5] The only one of this Court's rulings relied upon by the states in this regard, *Minnesota v. United States*, 305 U.S. 382 (1939), is simply not apposite. The holding that removal could not constitute a waiver of federal sovereign immunity was premised on the conclusion that the case could not have even been originally brought in state court. See id. at 389 ("If Congress did not grant permission to bring this condemnation proceeding in a state court, the federal court was without jurisdiction upon its removal."). This (continued...)

would be consistent with the position advocated here by Petitioner, that states preserve their other immunities as they are consenting to a federal court's ruling on those defenses. Just as the United States could not withdraw a case from federal jurisdiction after a removal, in the event it was dissatisfied with a court's ruling, neither can states renege on their invocation of federal jurisdiction.

4. Respondents' last assertion is that a state's litigation objectives of removing-and-claiming-immunity outweigh a plaintiff's interest in a single, unitary proceeding, and such a balance is endorsed by this Court's decisions in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), and *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998). As can be discerned from the foregoing discussion, Petitioner believes that no legitimate purpose is served by Georgia's strategic use of removal in this case. But even if there were such genuine objectives, they would still not rise to the level of subverting plaintiffs' interests in having a single forum decide the common issues and claims of their cases.

Nothing in *Pennhurst* or *Schacht* is contrary to this consideration. The plaintiff in *Pennhurst* filed her suit in federal court, while Lapides filed in state court. The language in *Pennhurst* that Georgia relies upon (see Resp. Br. 22) can be seen to apply only where the state-defendant has not waived its

[5](...continued)
was expressly made consistent with the "derivative jurisdiction" rule for removals, see id., a rule that was subsequently superseded by statute. See 28 U.S.C. § 1441(e). In any event, and as has been noted by some lower courts, *Minnesota* is suspect authority for the proposition that a federal court is disabled from ruling on a matter, even where the U.S. Attorney General removes a case. See *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1576-77 (Fed. Cir. 1995).

Eleventh Amendment immunity, since the decision seems moored to the concept of the state's dignitary interests under the Eleventh Amendment. See 465 U.S. at 106. If *Pennhurst* rests on the concept of the state's immunity in federal court as to claims against it under state law, the "intrusion" into state sovereignty with which the Court was concerned in *Pennhurst* would not appear to apply when the state is voluntarily in federal court after a plaintiff sought relief solely in state court. And while Georgia claims that "states have a vested interest in having their own courts decide issues of state law" (Resp. Br. 22), Georgia certainly had an opportunity to have its own courts decide the state law issues in the case but invoked the jurisdiction of the federal courts supposedly to benefit the individual defendants. Given that the state sought the advantages of the federal forum as to some claims, allowing it to now assert that the federal court would be intruding on its sovereignty in deciding the other claims puts Lapides, not the state, at an "unfair tactical disadvantage." See *Schacht*, 524 U.S. at 397-98 (Kennedy, J., concurring).

As for *Schacht*, the Court made quite clear that its holding went only so far as a "State's *proper* assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim." 524 U.S. at 392 (emphasis added). As Justice Kennedy pointed out in his concurrence, the Court neither reached nor considered the argument that the state waived its immunity by removing the case. See id. at 393 (Kennedy, J., concurring). Moreover, *Schacht* involved no state law claims, so the barred claims the Court recognized there were necessarily only federal claims against which the state was immune under the accepted understanding of the Eleventh Amendment. The Court did not have cause to consider the effect of the rule on state law claims originally properly filed in state court. Petitioner's removal-as-waiver argument clearly dovetails

with the Court's stated concern in *Schacht* of a "proper" assertion of the Eleventh Amendment immunity.

D. *Ford Motor*'s Authorization Requirement is Inapplicable in Removal Cases

As Petitioner discussed in his Opening Brief, *Ford Motor Co. v. Dept. of Treas. of Indiana*, 323 U.S. 459 (1945), simply is not implicated in this case. *Ford Motor* has been properly cited for the propositions that a state sued in federal court may raise its Eleventh Amendment immunity at any time during litigation, see *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), and that, in suits seeking money damages that would be paid out of the state treasury, the state is the true party in interest and therefore entitled to sovereign immunity, see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 277 (1997). These holdings of *Ford Motor* need not be disturbed should the Court adopt a rule that a state's removal of a case to federal court waives its Eleventh Amendment immunity, irrespective of the authority of the state official involved.

Georgia nonetheless asserts that a rule that a state's removal of a case to federal court waives its Eleventh Amendment immunity likely would have two undesirable consequences. (Resp. Br. 30-31). Respondents claim that under this rule, this Court would be "repeatedly faced with deciding what specific conduct by the states' attorneys general amounts to a waiver" and that states would be "forced to limit the litigation conduct of their lawyers." The Court need not spectate on this parade of horribles.

1. Should the Court adopt a rule that removal to federal court constitutes a waiver of immunity, this rule would be a clear guideline and one that both the federal courts and the states'

Attorneys General could apply straightforwardly. This rule explicitly identifies a specific litigation conduct (removal to the federal courts) with a specific litigation result (waiver of Eleventh Amendment immunity). The rule that Petitioner proposes here simply defines one example of conduct by a state that will be construed as "voluntarily invok[ing]" or as clearly declaring an intention to submit itself to the jurisdiction of the federal courts. *Coll. Sav. Bank*, 527 U.S. at 675-76.

Georgia also complains that states and their Attorneys General would be "forced to guess" as to what conduct may be deemed a waiver and that a state could take action that amounts to an "accidental waiver." (Resp. Br. 30-31). However, the rule Petitioner propounds would not allow for such "accidental waiver" of Eleventh Amendment immunity. Removal to the federal courts requires affirmative action on the part of all defendants in litigation, including states. See 28 U.S.C. § 1441. It is difficult to see how the filing of a notice of removal in a federal court and any notice to stay proceedings that may be required in state court could amount to an "accidental waiver" of immunity.

2. As for the assertion that Petitioner's submission would force states to limit the litigation conduct of their lawyers, that is precisely what should occur. The suggestion of Georgia's amici (see Tex. Br. 2, 21-22), that assistant state Attorneys General are so "politically unaccountable," unsupervised, and generally overworked, as not to be trusted with the decision to remove a case and to waive a state's Eleventh Amendment forum immunity, would be bizarrely humorous if it were not an admission against interest. The reality is that every pleading filed by a state Attorneys General office bears the name and imprimatur of the constitutional official elected or appointed to serve as the legal agent of the state. If assistant state Attorneys General need to be protected from their own inadvertence,

Petitioner might suggest stronger supervisory mechanisms should be imposed by these offices.[6] And, indeed, such supervision might properly be made by state legislatures. In this respect, Georgia's and its amici's contention that the waiver rule propounded by Petitioner would somehow reduce the stature of state legislatures in making essential sovereign immunity decisions is quite beside the point.

3. Lastly, Petitioner cannot let go unremarked the assertion by Georgia's amici (Tex. Br. 30), that this Court must not inquire into the reason or expediency of a rule of sovereign immunity in relation to particular litigation conduct engaged in by a state, even where the state itself invoked federal jurisdiction via removal of a case. But the evolving Eleventh Amendment jurisprudence of this Court has long been guided by the reason and expediency of properly balancing the legitimate sovereign interests of states with the normal expectations of private litigants. Petitioner is confident than in its wise weighing of these considerations this Court will hold that in the special and compelling circumstances presented here that a state waives its Eleventh Amendment forum immunity when it affirmatively invokes the jurisdiction of the federal courts.

[6] To its credit, Georgia does not appear to join in this contention. The names of no less than five attorneys, including Georgia's Attorney General, appeared on the original Notices of Removal filed in this case. See J.A. 6, 8. Three of these lawyers actually signed the pleadings. To maintain that all were somehow asleep at the switch, would raise a disheartening condemnation of the competence of state attorneys everywhere. This Petitioner declines to do.

CONCLUSION

For the foregoing reasons, and those articulated in Petitioner's Brief on the Merits, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record[7]
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

MICHAEL J. BOWERS
Of Counsel
Meadows, Ichter & Trigg
Eight Piedmont Center, Suite 300
3525 Piedmont Road
Atlanta, Georgia 30305
(404) 261-6020

PATRICK W. MCKEE
Of Counsel
Suite 921, The Candler Building
127 Peachtree Street
Atlanta, Georgia 30303
(404) 577-8300

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